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Corporate Social Responsibility: European Models

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Corporate Social Responsibility: European Models

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I. Introduction

"A big corporation shouldn't destroy a building that has meant so much to so many for so long."[1] Few if any European advocates of corporate social responsibility have been as eloquent as Jacqueline Kennedy Onassis and Joan Mondale in their efforts to block the Penn Central Railroad's plans to demolish New York's Grand Central Building. By and large, however, the questions arising in the area of corporate social responsibility are similar on both sides of the Atlantic: Should a large corporation raise prices in a manner detrimental to national economic policy, maintain close ties to so-called imperialist countries, construct or operate nuclear power plants, or pursue other projects potentially dangerous to the environment? These three or four questions not only illustrate the current European perception of the subject of corporate social responsibility, but also define some of the problems facing those who wish to implement such a system of social responsibility.

Corporate social responsibility may be broadly defined as the duty of an enterprise to consider in a general way the public interest. The ultimate goal of corporate social responsibility is to establish among corporate decision-makers an entrepreneurial behavior solicitous of the public interest even when such behavior also proves detrimental to spe-

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1. NEWSWEEK, May 1, 1978, at 25.

cific business interests such as profit maximization. This entrepreneurial behavior cannot be defined, however, in terms of specific legal commands and interdictions. Instead, in attempting to define this behavior, we find ourselves in a "gray zone" between voluntary benevolence, strictly moral obligations, and sweeping legal duties. This ambivalence naturally results from the fact that corporate social responsibility is, in the final analysis, basically concerned with nothing else but the general concept of "good citizenship" as addressed specifically to the large corporate enterprise. The legal system is, therefore, confronted with the difficult task of turning this general corporate obligation of good citizenship into a *legal* requirement meaningful and effective in any given instance.[2]

Although corporate social responsibility may be loosely identified with corporate good citizenship, the notion of good citizenship nevertheless acquires quite a new dimension when a large corporation is involved. The actions of a large corporation inevitably affect the public interest to a much greater extent than in cases where only an individual citizen is involved. Consequently, in any ensuing conflict between the corporation's own commercial interests and the general public welfare, the stakes are much higher than when a private individual's interests conflict with the public interest. The large enterprise's powerful and potentially destructive impact on the public interest, therefore, naturally singles it out as the addressee of corporate social responsibility. With the large enterprise, private power is transformed into public power; the enterprise itself is transformed into a public institution. The quantitative difference between the individual citizen and the big enterprise develops into a qualitative distinction.[3] To this public power public responsibility must correspond. The theory of corporate social responsibility, however, applies equally well to any enterprise, irrespective of size, whose actions may have a significant economic impact on the public at large or to any corporation that may potentially dominate the market. The sheer size of its sales and profit figures may also play a

2. In contrast, the adoption of *express* legal provisions which specifically define certain conduct as illegal—for example, zoning and environmental laws—is not a problem of corporate social responsibility in the narrow sense of the term. The large corporation owes obedience to such prohibitions no less than any other citizen. In a larger sense, however, one may consider the comparatively modest task of making corporations law-abiding as a first step towards greater corporate social responsibility in the same manner that civic obedience to the law is considered a prerequisite to good citizenship.

3. J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967); J. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE (1973); H. MERTENS, C. KIRCHNER & E. SCHANZE, WIRTSCHAFTSRECHT 106 & *passim* (1978); C. OTT, RECHTUND REALITAT DER UNTERNEHMENSKORPORATION (1977).

role in that it makes financial sacrifices for the public interest appear more tolerable.

None of these criteria—the enterprise's size and significant economic power, its control of the market, or the size of its profits—is necessarily limited to the corporate form of enterprise organization.[4] However, enterprises that have one or more of these attributes are typically organized as corporations. In addition, the internal structure of the corporation which generally consists of the separation of ownership and control seems to create a particularly unfavorable climate for voluntary good citizenship[5] and hence the need for some theory or rule of social responsibility to govern its actions.[6]

This Article will examine the various modes proposed and/or adopted in Europe for imposing upon corporations a sense of responsibility for the public welfare. The Article will conclude that the most promising means for achieving this goal is to bestow upon independent trustees the power to manage the enterprise and to impose upon the

4. In most European countries alternative forms of enterprise organization are of greater importance than in the United States, in particular the "limited company," unknown in the United States and somewhat comparable, under a functional perspective, to the close corporation.

5. The impediments to voluntary good citizenship resulting from the corporate structure can be found, in terms of behavioral analysis, in a certain weakness of motivation. The peculiar distribution of power and responsibility within the corporate structure contributes to eliminating some essential motivations for voluntary respect of the public interest. The diversification of responsibility engendered by the two-tier or three-tier power structure, for example, impairs the development within one person or group of both a sense of responsibility to the public in general, as well as a bad conscience for any action or decision detrimental to the public welfare. This makes it easy for management to exonerate itself from its social responsibility by referring to an obedience to its shareholders and for the shareholders, at the same time, to disguise a boundless egoism (as distinguished from their legitimate interest in profits) behind the veil of anonymity or to claim their utter helplessness vis-a-vis management. *See generally* Vagts, *Reforming the "Modern" Corporation: Perspectives From the German*, 80 HARV. L. REV. 23 (1966) [hereinafter cited as Vagts]; Roth, *Supervision of Corporate Management: the "Outside" Director and the German Experience*, 51 N.C.L. REV. 1369 (1973).

6. The separation of ownership and control in the public corporation also makes a strong argument in favor of bringing interests other than shareholder interests into the picture as well. See notes 66-85 & accompanying text *infra*. It is certainly not coincidental, moreover, that the origins of the American corporate social responsibility doctrine, *see* Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145-63 (1932); Dodd, *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?* 2 U. CHI. L. REV. 194-207 (1934), can be traced back to the discovery of the separation of ownership and control phenomenon. A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (rev. ed. 1968). *See generally* A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION (1954); A. BERLE, POWER WITHOUT PROPERTY (1959); Berle, *Property, Production and Revolution*, 65 COLUM. L. REV. 1 (1965); Berle, *Corporate Decision-Making and Social Control*, 24 BUS. LAW. 149 (1968).

corporation a system of social accounting that would provide the public with meaningful information concerning the corporation's activities. Such trustees would be under a duty to consider all interests—including the public interest—in all its decisions and such increased public awareness would stimulate management to examine more closely the public welfare in administering the enterprise.

The doctrine of corporate social responsibility has been recognized to a different extent among the various European legal systems. Although the doctrine has been expressed in different forms, two basic approaches have been pursued. The *external approach* applies governmental power or other mechanisms of external social control in order to guarantee an entrepreneurial behavior that is solicitous of the public welfare. Under this approach the government either establishes express legal duties or creates other external motivations to realize the desired behavior. German-Austrian law, for example, recognizes a general and comprehensive responsibility of management to consider the public welfare in discharging its corporate duties. The law also contains specific legal regulations imposing enforceable standards of conduct upon corporate management and equips governmental agencies with certain regulatory powers. The *internal approach*, on the other hand, provides for a representation of public interests within the power structure of the enterprise itself, thus enabling the public to influence directly the enterprise's decision-making process. In Germany and other parts of Europe, for example, employee codetermination is one example of the internal approach. In addition, in several European countries the state has extensive capital investments in large corporations allowing a direct participation in the decisionmaking process.

II. Corporate Social Responsibility as a Duty of Management

General Legal Provisions

The most conspicuous expression of the doctrine of corporate social responsibility found in some European corporation laws is the express duty of management to consider the public interest in the administration of the enterprise. The German Corporations Code of 1937, for example, required the *Vorstand*[7] "to direct the company in accordance with the requirements of the enterprise and its working

7. The *Vorstand* is akin to the management board of the American corporation or to the insider or officer members on the board of directors of the American corporation. *See generally* authorities cited note 5 *supra*.

force and the common welfare of the people and the empire."[8] Regardless of its national-socialist phraseology, this statutory language expresses a principle of corporate responsibility for the public welfare that in substance corresponds to the ideas developed for the American public corporation[9] and that had been recognized in Germany well before the dominance of national-socialist ideology.[10] Although the present German Corporations Code has eliminated this statutory language, the principle as such is still accepted as valid by most commentators.[11]

In Austria, the duty of management as stated in the German code of 1937 is still the law. Only the formulation has been modified. The *Vorstand* is required to direct the company "for the benefit of the enterprise with regard to the interests of shareholders and employees as well as to the public interest."[12] The law, therefore, generally recognizes the doctrine of corporate social responsibility in that it expressly requires the management of the corporation to consider, in the administration of the enterprise, not only its shareholders' interests but other interests as well, including the public interest. The only remaining

8. § 70(1) GERMAN CORP. CODE (AKTIENG.).

9. *See* authorities cited note 6 *supra*. *But see* W.O. DOUGLAS, DEMOCRACY AND FINANCE (1940); P. DRUCKER, THE NEW SOCIETY 203, 337 (1950); Donaldson, *Financial Goals: Management v. Stockholders*, 41 HARV. BUS. REV. (No. 13) 116-29 (1963); Harbrecht, *The Modern Corporation Revisited*, 64 COLUM. L. REV. 1410-26 (1964); Rostow, *To Whom and For What Ends is Corporate Management Responsible?*, in THE CORPORATION IN MODERN SOCIETY 46-71 (E.S. Mason ed. 1969).

10. K. GEILER, DIE WIRTSCHAFTLICHEN STRUKTURWANDLUNGEN UND DIE REFORM DES AKTIENRECHTS 2 (1927); J. KEYNES, DAS ENDE DES LAISSEZ-FAIRE (1926); W. RATHENAU, VOM AKTIENWESEN (1917). *See also* G. ROTH, DAS TREUHANDMODELL DES INVESTMENTRECHTS 201 (1972) [hereinafter cited as ROTH].

11. D. BAAS, LEITUNGSMACHT UND GEMEINWOHLBINDUNG DER AG (1976) [hereinafter cited as BAAS]; B. KROPFF, AKTIENGESETZ 97 (1965); J. LOOCK, ZUR VERANTWORTUNG DES VORSTANDES DER AG NACH § 76 I (Diss. Hamburg 1977); K. RUMPFF, ZUR SCHUTZRICHTUNG AKTIENRECHTLICHER VORSCHRIFTEN UND IHRE BEDEUTUNG FÜR DIE VERANTWORTLICHKEIT DES VORSTANDES 74-115 (1969); H. WÜRDINGER, AKTIEN- UND KONZERNRECHT § 21(IV)(2)(b) (1966); KÖLNER KOMMENTAR (H. J. MERTENS) § 76 AKTG NO. 5; J. Meyer-Landrut in GROßKOMMENTAR I/2 § 76 AKTG No. 9 (1973); W. Hefermehl in E. GEßLER, W. HEFERMEHL, U. ECKARDT, B. KROPFF, AKTIENGESETZ II § 76 AKTG No. 21 (1973/74) [hereinafter cited as HEFERMEHL]; R. VON GODIN-H. & S. WILHELM, AKTIENGESETZ I § 76 AKTG No. 5f (1971); ZUR VERANTWORTLICHKEIT DER AM UNTERNEHMENSLEBEN BETEILIGTEN INTERESSEN, Betr. 1971, 140-206. Some authors even derive this general principle of corporate social responsibility directly from the constitution (GRUNDESETZ art. 14(2): the so-called social commitment of property. W. HEFERMEHL, *supra*; B. KROPFF, *supra*; H. J. MERTENS, *supra; see* R. Reinhardt, *Privates Unternehmen und öffentliches Interesse*, FESTSCHRIFT A. HUECK 439-50 (1959); F. Rittner, *Zur Verantwortung des Vorstandes nach* § 76 *Abs.* 1 *AktG* 1965, DIE AG 1973, 113-22; FESTSCHRIFT E. GEßLER 139-58 (1971).

12. § 70(1) AUSTRIAN CORP. CODE (AKTIENG.).

question is whether the formulations of this general managerial duty such as the one found in the Austrian code, indicate a legal order of precedence among the various interests to be considered by management.[13]

A general legal provision of this nature, however, is not self-executing. What is needed to make this provision effective is some independent third party to judge management's behavior in light of this general obligation and to impose sanctions for any violations of its obligations. For the several reasons examined below, however, this manner of enforcement has not as yet been realized. Any attempt to distill specific duties of management from its general obligation to consider the public welfare necessarily meets with enormous difficulties. It proves difficult, for example, to derive from this general obligation a specific managerial duty to keep prices at a lower level, or to refrain from reducing production in view of threatening unemployment, or to ensure that all products are environmentally safe, or even to make charitable contributions.[14] Commentators, therefore, interpret this general corporate responsibility for the public welfare as nothing more than a general authorization for management to weigh at its own discretion the conflicting interests of the enterprise, the shareholders, the employees, the consumers, and the public at large. Presently, judicial or agency review of management's exercise of this discretion is unavailable.[15] In short, there are no legal sanctions against management for violation of its general social responsibility. Whereas the German Corporations Code of 1937 provided for a compulsory dissolution of the company on account of jeopardizing the public welfare,[16] modern German corporation law provides for dissolution in this area only when such jeopardy to the public welfare is caused by specific unlawful conduct of management.[17] The Austrian Corporations Code likewise does not contain legal sanctions for management's violation of its general duty of social responsibility.

13. When the statute of a European stock company (*societas europea)* was being drafted as the supra-national corporation law for the European Common Market, *see* E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS 424-82 (1971), a proposed provision holding corporate management generally responsible to the public was discussed. Art. 70 read as follows: "The members of the management board are bound to . . . further the welfare of the company and of its employees." The committee on economic and social matters had recommended the following supplement: "within the limits of the public interest." The final text, however, does not contain any such provision.

14. *But see* D. BAAS, LEITUNGSMACHT UND GEMEINWOHLBINDUNG DER AG (1976).

15. HEFERMEHL, *supra* note 11.

16. § 288 CORP. CODE OF 1937.

17. § 396 CORP. CODE OF 1965.

Detailed legal rules governing management's general social responsibility, moreover, are sometimes considered incompatible with a free economic system. One commentator has argued that any such governmental intrusion into management's discretionary power to weigh the various commercial and public interests would deprive management of that freedom of decision, self-determination and ultimate responsibility that is the cornerstone of any system of private enterprise, and would turn the enterprise into a public organ.[18] Such an argument, however, although persuasive, fails to address the decisive question whether the large corporation, because of its potentially enormous impact on both the economy and society in general, should be exempt from governmental interference. A second argument against the promulgation of specific legal rules to govern management's general obligation to consider the public welfare appears more convincing. Corporate management would clearly be overtaxed were it required to take into account in every detail the potential impact of its decisions on the public interest and to weigh all the interests involved in such a comprehensive and qualitative manner as to withstand any subsequent judicial scrutiny of its decisions.[19] The difficulties with which even a legislator is confronted in the comparable situation where he or she must assess the myriad possible effects of a legislative measure are a well-known subject of modern law and social science research.[20] Indeed, corporate management is even less qualified for this task and normally cannot afford either the time-consuming diligence of a legislator or his comprehensive sources of information and instruments of social science research. As a consequence, one should not expect man-

18. HEFERMEHL, *supra* note 11.

19. H.-G. KOPPENSTEINER, INTERNATIONALE UNTERNEHMEN IM DEUTSCHEN GESELLSCHAFTSRECHT 211-15 (1971).

20. 2 N. LUHMANN, RECHTSSOZIOLOGIE 309-15 (1972); P. NOLL, GESETZGEBUNGSLEHRE 54-58 (1973). An excellent example of the multiple and, possibly, contradictory consequences of a rise in automobile prices is given in H. MERTENS, C. KIRCHNER & E. SCHANZE, WIRTSCHAFTSRECHT 120 (1978): (1) A price increase by the leading auto manufacturer stimulates inflation. (2) The price increase entails higher state revenues from corporate income tax and from state stockholdings in the corporation. (3) The distributive aspect: the many small shareholders of the corporation receive adequate dividends for their investment, which is desirable under a social perspective. (4) Higher profits of the corporation are tantamount to a higher investment potential: money is channeled into investment instead of consumption. (5) Investment will create jobs. (6) Investment will strengthen the competitive position on the international markets. (7) Higher profits for this car manufacturer indirectly support the development of the (s. c. underdeveloped) region where its factories are located. (8) Making the automobiles more expensive reduces the sales figures and thus means savings in energy. (9) and savings in road construction expenses as well. (10) This contributes to higher unemployment, and so on.

agement always to find the optimum compromise. All that can reasonably be expected is the exercise of its best efforts to the extent commonly applied in business matters. To impose higher standards of decision-making upon management might very well result in paralyzing its entrepreneurial activity, thereby impairing management's economic efficiency to the detriment of every interest involved.

What remains, as a practical matter, of management's general duty of social responsibility, as recognized in German and Austrian law, is the authorization of management to subordinate in any given case company and shareholder interests to the public interest, if it *wants* to. When acting within certain very broad limits, therefore, management need not fear legal action on the part of its shareholders for the exercise of its discretion in this area.[21] It must be emphasized, however, that management is under no *obligation* to forego commercial and shareholder interests in favor of the public interest. If it does not want to do so in any particular case, it does not violate the law.[22]

This result seems reasonable insofar as it leaves to management the freedom to choose among the conflicting interests involved. But the inevitable and unfortunate consequence of bestowing on management this freedom is to grant to management the concommitant right to decide in the first instance whether to consider the public interest at all.

Specific Legal Provisions

The enforcement of management's duty to consider the public interest in administering the enterprise becomes less complicated—at least from a legal standpoint—when specific legal provisions impose direct obligations upon the enterprise. Then, when the enterprise fails to observe these obligations voluntarily, the law can more easily compel compliance. As a result of this apparently more simplified method of enforcing an enterprise's duty to protect the public welfare, a tendency has developed to protect the public interests increasingly by means of specific statutory laws that leave management little if any discretionary leeway. Examples of this include provisions of environmental, industrial safety, and consumer protection laws. Whereas, these statutes are not aimed exclusively at the large corporation, many of

21. Dissatisfied shareholders, of course, may always register their dissatisfaction with management's decision by exercise of their corporate voting rights. Management's action, however, does not violate the law.

22. BAAS, *supra* note 11; HEFERMEHL, *supra* note 11; and S.H. Westermann, *Die Verantwortung des Vorstandes der AG*, FESTSCHRIFT H. VITS 251 (1965) obviously do not see the connection.

these provisions as a practical matter affect mainly the big enterprise.[23]

Specific legal provisions, like the general corporate obligation discussed above, also present problems of law enforcement.[24] At least in Germany, big business by and large complies with specific legal provisions. In the field of environmental law, for example, large corporations generally have the best record in meeting the standards imposed upon them.[25] It is certainly much easier, moreover, to enforce these specific legal obligations than to compel compliance with the general duties mentioned above. In particular, government supervision can be applied more effectively with specific legal provisions.[26]

Several more important impediments to enforcing corporate social responsibility by means of specific legal provisions exist. In many areas, for example, it is simply impossible, because of the nature of the problems involved, to define the legal requirements in universally applicable standards. In other areas, such standards cannot be tailored adequately to the specific capacity of a big corporation. In some important cases, finally, the legislative bodies themselves cannot settle on an appropriate standard in conflict of interest situations.[27]

III. Indirect Nonlegal Sanctions

Public Opinion

Although it is often impossible to define and enforce management's duty to the public welfare by means of specific legal provisions, public opinion, particularly that articulated by the mass media, may nevertheless achieve this goal. In contrast to the judicial system, public opinion need not justify its specific demands upon corporate management by reference to any code of law nor need its sanctions satisfy the principles of constitutional law. Social control through public opinion can have an impact even upon a discretionary power of management, the exercise of which is not amenable to judicial control. If such social control is effective, management must consider in all cases, prior to ex-

23. Most antipollution laws, for example, have little relevance to the ordinary citizen.

24. *But see* G. ROTH, EFFEKTIVITÄTSPROBLEME IM UMWELTSCHUTZ, FESTSCHRIFT V. D. HEYDTE 1143 (1977).

25. Of course, the possibility that the large enterprise is more skillful in concealing its violations cannot be overlooked.

26. One possible exception to this observation is the multinational enterprise where the effectiveness of governmental authority generally poses much more of a problem. *But see* NEWSWEEK, Sept. 11, 1978, at 4; GAHLER HARDES, RAHMEYER & SCHMID, VOLKSWIRTSCHAFTSLEHRE 392 (1976).

27. H. MERTENS, C. KIRCHNER & E. SCHANZE, WIRTSCHAFTSRECHT 169 (1978).

ercising its discretionary power, the myriad possible reactions of the public to its ultimate decision.

One cannot usually expect, however, that public pressure will arise spontaneously. Without joining the cynic who regards any expression of public opinion as manipulated, one must recognize that some kind of activism by organized groups is often essential. In Europe, however, at least in the field of corporate social responsibility, such mechanisms are rather exceptional. Powerful established organizations of common interest may occasionally succeed in influencing the management of corporations whose activities directly affect this interest. The German automobile associations, for example, have successfully pressed their demands for safer cars and better warranty conditions. But such organizations are relatively rare.

More direct in their approach, though not necessarily more effective in their results, are certain militant organizations devoted to open warfare against entrepreneurial policies allegedly detrimental to the public weal. In Europe, however, this approach until now has essentially been confined to environmental causes such as actions against nuclear power plants.[28] In the field of consumer protection most European nations have not yet proceeded as far as the United States although in some countries consumerism is gaining momentum and comparative testing of products is becoming increasingly important.[29]

Social Accounting

Publicity concerning the corporation's activities, however, does not arise simply from the ranks of disgruntled consumers or shareholders. Motivated by a desire to procure public acclaim for its allegedly responsible conduct, management likewise tries to mobilize public opinion on its own. A remarkable development in this area in recent years has been the emergence of social accounting. In connection with the annual statement of accounts,[30] some European corporations,[31] pursu-

28. This example illustrates, however, the fine line between organized action to enforce corporate social responsibility and political opposition. A particularly interesting activity pursued by some of these organizations—here clinging to the Ralph Nader model—is to make their views heard at shareholder meetings. Although mobilizing public opinion is probably the main purpose of these activities, they nonetheless qualify, at least in form, if not in substance, as intra-corporate shareholder activities. The role of shareholders in enforcing corporate social responsibility is discussed at notes 40-51 & accompanying text *infra*.

29. In Germany, for example, comparative testing of products is conducted by an independent institution, the *Warentest* foundation.

30. § 148 GERMAN AKTIENG.: annual balance sheet and income statement.

31. In Germany the first company to do so was STEAG in 1973, and later on BASF,

ant to the American model of social accounting, publish a "balance sheet" of the profits the public has derived from the corporation. In practice, this usually entails a statement of the corporate expenditures for public and social purposes. Management uses social accounting for two basic reasons: to impress the general public and the political decision-makers with a detailed list of the enterprise's contributions to the public welfare (thereby preventing legislative or administrative measures disadvantageous to the corporation) and to earn the respect of its *employees* and their representatives so as to prevent excessive labor demands.

In its most elaborate form, the social account is presented as a reformulation of the annual profit and loss statement with corporate expenditures such as operating costs, expenses, wages, and dividend payments arranged according to the various persons or beneficiaries who receive the benefit of these expenditures.[32] Current practice favors a division of beneficiaries as follows: capital, the working force, the community, and the enterprise. Such expenditures as tax payments, charitable contributions, costs of environmental protection, and information to the public are allocated to the community; expenses for salaries, social security, pension funds, and intramural sporting activities are assigned to the working force. To the capital account is assigned corporate expenditures for dividend payments and interest payments on outstanding loans. Finally, expenses for depreciation and research are allocated to the corporation.[33]

Following is a sample social accounting sheet based on the 1977

SHELL, and BP. *See* Empfehlungen des Arbeitskreises "Sozialbilanz-Praxis" DB 1141 (1978).

32. One basic difference of opinion is whether the statement ought to be drafted as an "account of benefit" comprising the costs and expenses in total, or as an "account of value created" only, with input from external sources (such as canteen meals purchased from outside) deducted. *See* p. e. Deutsch Shell AG, Geschäftsbericht/sozialbilanz 1977, S 12. 55, 59-67.

33. German literature on social accounting: K. BROCKHOFF, GESELLSCHAFTSBEZOGENE BERICHTERSTATTUNG DER UNTERNEHMEN, ZfbF 1975, 39-47; K. BROCKHOFF, ZUR EXTERNEN GESELLSCHAFTSBEZOGENEN BERICHTERSTATTUNG DEUTSCHER UNTERNEHMEN (1975); M. DIERKES, DIE SOZIALBILANZ (1974); P. EICHHORN, GESELLSCHAFTSBEZOGENE UNTERNEHMENSRECHNUNG (1974); P. EICHHORN, GRUNDLAGEN EINER GEMEINWIRTSCHAFTLICHEN ERFOLGSRECHNUNG FÜR UNTERNEHMEN (1974); A. HEIGL, KONZEPTE BETRIBLICHER UMWELTRECHNUNGSLEGUNG, DB 1974, 2265-70; G. LÖCHERBACH, DIE "SOZIALBILANZ" ALS INFORMATIONS-UND RECHENSCHAFTS LEGUNGSINSTRUMENT DES UNTERNEHMENS, BETRIEBSWRITSCHAFTLICHE FORSCHUNG UND PRAXIS 1975, 53-58; G. LÖCHERBACH, DIE SOZIALBILANZ, BBG 1975, 401-06; MINTROP, GESELLSCHAFTSBEZOGENE RECHENSCHAFT-SLEGUNG (Diss. Zurich o. D.); H. WEDELL, DIE WERTSCHÖPFUNG ALS MEßGRÖßE FÜR DIE LEISTUNGSKRAFT EINES UNTERNEHMENS, DB 1976, 205-13; WEIHE, CORPORATE SOCIAL ACCOUNTING, DIE UNTERNEHMUNG 1975, 219-30; F.

statement of the German Shell Corporation. For our purposes, the statement has been greatly simplified.

Sample social accounting sheet

Beneficiaries	Distribution (in Mill. DM) of "benefit" (total amount of expenses)	value added
I. Working force		
—wages and salaries	214	214
—special allocations and benefits	80	76
—insurance and pension premiums	84	83
—expenses for continuing education, information, canteen, health, industrial safety, sport, and factory committee.	10	3
	388	376
II. Community		
—taxes	47	47
—charitable and other contributions	6	—
—information	4	—
—environmental protection (investments)[34]	61	—
—research[35]	(—)	—
—royalties	70	—
	188	47
III. Capital		
—dividend	(—)	(—)
—interest for outside capital (loans)	48	48
	48	48
IV. Enterprise		
—reserve fund (to meet future losses or liabilities)	−34	−34
—depreciation	230	—
—research	11	—
	207	−34
	831 Mill.	437 Mill.

The first problem in the context of social accounting is the allocation and valuation of the different income items. No obligatory guidelines exist, and management is free, for example, to claim as a social service expenses for the continuing professional education of its employees even though such expenses were incurred in the very interest of

Dribbusch, *Die Erfassung und der Ausweis des sozialen Verhaltens* in DER SOCIALBILANZ (am Beispiel der BASF), RdA 1978, 103-08.

34. An example for lack of consistency: investments-depreciations.

35. An example of a doubtful classification: sub IV (thus the SHELL AG) or sub II (thus the BASF AG).

the enterprise itself.[36] Nevertheless some check on management's allocation and valuation of expenditures can be expected from the very public opinion management seeks to impress, for a social account must be somewhat plausible in order to yield the desired effect. Whenever social accounting is used for competitive purposes, moreover, the law against unfair competition might offer an even more effective instrument of control for intentional misrepresentation.

A more aggravationg problem with social accounting is that some of the more important aspects of corporate social responsibility cannot be adequately represented in the form of accounting data. The results of a restrained pricing policy pursued in the public interest, for example, is not easily reflected on the social accounting sheet. Even more difficult is a realistic appraisal of the social input into the enterprise. How does one assess the various social values consumed *by* the enterprise without adequate consideration such as the strains its activities place on the environment? The social accounting system currently used completely ignores this side of corporate operations.[37]

In spite of all its weaknesses social accounting remains a rather promising method for monitoring corporate social responsibility. It may also prove to stimulate management to examine more closely the public welfare in administering the enterprise. In order to achieve these goals, however, more and more corporations must publish social accounting statements, and the statements themselves must be improved and standardized so as to guarantee more substantial and accurate information. The time has probably not yet come, however, for making such statements mandatory by law.[38] Any such statutory requirement, if adopted prematurely, might only prove to impair unnecessarily the further refinement of social accounting. Instead, a greater use of social accounts may be achieved by means of a more gentle pressure exercised by the model-behavior of a few corporations. As more corporations prepare social accounts and thereby establish for them-

36. S. Süddeutsche Zeitung, 20./21.5.1978, at 33. This is the reason for the negative attitude of the trade unions towards social accounting. *But see* DER SPIEGEL, 21.8.1978 (Nr. 32) 82; ARBEIT UND WIRTSCHAFT 7/8 1977, at 46-48.

37. In all fairness, however, it should be noted that an informative statement of such items is hardly conceivable in the present stage of social accounting practice.

38. In France, an annual statement of social accounts will be mandatory for all large corporations beginning in 1979 and will be regulated in detail by statute. The French law, however, quite clearly emphasizes employee interests and appears rather to be more an instrument of labor law than a system to gauge corporate social responsibility. Law of July 12, 1977, [1977] J.O. *But see* KAPP-PETITGUYOT, LE BILAN SOCIAL, SON APPLICATION LEGALE (1978).

selves a positive public image, still other corporations will feel compelled to join the bandwagon. The role of jurisprudence and economics should be limited to making general recommendations for improving the methods of social accounting.[39]

IV. Corporate Social Responsibility and Shareholder Powers

Public interest shareholder proposals

The common perception of the corporation as a balance of at least two powers—management and capital owners—raises the question whether stockholders should also bear their share of corporate social responsibility in the exercise of their stockholder rights. The instrument most effective in serving the public interest is the shareholder's voting rights; the derivative suit is all but unknown in continental Europe as a remedy against managerial neglect of duties. Indeed, in recent years several cases of shareholder activities on behalf of the public interest in the annual meetings of large corporations made quite a stir in Germany. The main subjects at these meetings were the allegedly "imperialistic" policies of the corporation—participation, for example, in the construction of the Cabora Bassa dam in then Portuguese Mozambique—and the construction and operation of environmentally hazardous facilities such as nuclear power plants.[40]

From a legal standpoint, however, such shareholder initiatives are not proper shareholder proposals but merely critical responses to the performance of management or, at best, proposals regarding the election of directors or members of the supervisory board. The law clearly states that matters relating to the conduct of the ordinary business operations of the corporation do not come within the competence of the shareholders unless management—the *Vorstand*[41]—expressly allows the shareholders to decide such matters. In matters of the kind men-

39. Presently the most informative form of social accounting is an account of distribution recording all the expenses and allowances made by the enterprise, including gratuitous services which, because of their lack of consideration, are not reflected in the income statement (*e.g.*, an automobile manufacturer supplies the Red Cross with ambulance cars at a preferential price), and including as well allowances for extraneous production which, according to the present practice, are not counted as values created by the enterprise (*e.g.*, sale of goods bought from third parties to the employees at a lower price or even free of charge).

40. See the following press reports of 1972, the year when the movement first gained wide-spread publicity: 55 HANDELSBLATT 28; 56 HANDELSBLATT 5; 104 HANDELSBLATT 13; 130 HANDELSBLATT 5; Frankfurter Allgemeine Zeitung, May 23, 1972, at 13; Blick durch die Wirtschaft, May 5, 1972, at 5; Blick durch die Wirtschaft, May 3, 1972, at 5; Blick durch die Wirtschaft, May 25, 1972, at 3; Die AG 1972, 223. *See also* P. FORSTMOSER, DER AKTIONAR ALS FÖRDERER DES GEMEINWOHLS, ZSR 1973, 1-25.

41. § 119(2) GERMAN AKTIENG; § 103(2) AUSTRIAN AKTIENG.

tioned above, however, management normally has a very clear opinion of its own, and would rarely ask for a shareholder decision on these matters. One should expect, therefore, the same question to arise under German law which has become so important in the United States,[42] viz. should shareholder proposals that consist simply of a recommendation be admissible at shareholder meetings when the proposal concerns a matter not the proper subject for action by stockholders? Strangely enough, this problem has not yet met with any attention in Germany.

Even if such recommendations were admitted, however, shareholder proposals would fail because of a second obstacle: the legal regulation of voting at shareholder meetings[43] which makes it all but impossible for a shareholder to submit a proposal concerning corporate social responsibility matters. The law states that shareholders can vote only on those matters set forth in the agenda.[44] Except for certain mandatory topics not relevant here, the agenda is determined by the *Vorstand*.[45] Although the law confers certain minority rights on the shareholders, they are practically useless for our purposes here because of the quorum requirements and other formalities.[46] The individual shareholder can, therefore, express his or her opinion only within the agenda. The agenda, to be sure, may offer the shareholder some opportunity to discuss the annual report including the shareholder's right of information,[47] to give his or her general approval of the performance of the *Vorstand* and *Aufsichtsrat*,[48] but no opportunity is available to the shareholders[49] to vote on the very subject matter with which he or she is most concerned.[50]

Shareholders in a public corporation, therefore, cannot achieve by means of public interest shareholder activities a corporate policy responsive to the public interest—not even if a majority of the stockholders were willing to do so.[51] In the final analysis, public-interest

42. *See* 1934 Securities Exchange Act rule 14a-8.

43. The one power related to the ordinary business operations of the corporation which *is* indeed conferred upon the shareholders—delimiting the scope of the enterprise by charter amendment—is likewise limited by this regulation.

44. § 124(4) GERMAN AKTIENG.

45. §§ 121, 124(l) GERMAN AKTIENG.

46. §§ 122(2)-(3), 124(l), 123(l) GERMAN AKTIENG.

47. § 132 GERMAN AKTIENG.

48. § 120 GERMAN AKTIENG.

49. The management board is not elected by the shareholders. For details see Vagts, *supra* note 5.

50. *But see* M. LUTTER, DER AKTIONÄR IN DER MARKTWIRTSCHAFT 40 (1974); G.H. Roth, DNotZ 1975, 380.

51. Getting such a majority vote would be practically impossible anyway. When pub-

shareholder activities serve only to create publicity and thus to stir up public opinion.

Shareholder Voting Rights vs. Fiduciary Duties of Management

The preceding discussion illustrates the minor role that stockholders actually play in the administration and management of the public corporation. Indeed, the ineffectiveness of shareholder voting rights has been labeled a "travesty of corporate democracy."[52] Abolishing these voting rights, as suggested by Bayless Manning[53] in the United States and by myself in Germany,[54] might not only create a more reasonable and realistic foundation for the shareholder-management relationship but also provide for a more socially responsible management. This conclusion is based on the premise that a direct correlation exists between the fiduciary duty and the power and independence of the fiduciary, a premise clearly recognized in American trust law: "The greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty."[55] Recognizing as a matter of law that management, in administering the public corporation, operates independently of the shareholders, one is free to submit management to the higher standard of responsibilities of a trustee.[56] As long as corporate management is perceived as subject to the "ultimate control"[57] of the shareholders, moreover, management's fiduciary duties will likewise be seen as restricted almost exclusively to a concern for shareholder interests alone. Only with the abolition of this theory will management's fiduciary duties be expanded to include a concern for

lic interest activities are related to subjects on which the shareholders have the right to vote—the discharge of board members or the election of supervisory board members—the returns are usually 99 to 99.98% in favor of the management proposals. *See generally* ROTH, *supra* note 10, at 186; Roth, *Die Herrschaft der Aktionäre in der Publikums-AG*, in FESTSCHRIFT PAULICK 81-100, at 90 (1973). The same result is found in American corporations. See the results of "Campaign GM" as reported by Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 430 (1971) (2.73 and 2.44% in favor of public interest proposals).

52. *See* Manning, Book Review, 67 YALE L.J. 1477, 1485-90 (1958).

53. *Id.* at 1490.

54. ROTH, *supra* note 10, at 206-30.

55. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 541 (1949). *See also* Mayfield v. First Nat'l Bank of Chattanooga, 137 F.2d 1013, 1019 (1943); and, in a similar sense, the earlier case of Twin-Lick Oil Co. v. Marbury, 91 U.S. 587, 590 (1876). *See also* Bate, *The New Jersey Corporation: a Fiduciary Relationship*, 23 RUTGERS L. REV. 671, 679 (1969); Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1050 (1931).

56. ROTH, *supra* note 10, at 226-29.

57. Sommer, *Who's "In Control"*, 21 BUS. LAW. 559, 567 (1966).

general social interests as well.[58] Then management could no longer exonerate itself from its social responsibilities simply by referring to its "deliverance" to shareholder control.

It should be emphasized in this context that no infringement upon legitimate shareholder interests is intended. However, no corporate social responsibility theory can exist without recognizing that the shareholder is not the sole beneficiary of the enterprise's activities and that a fair balance of interests—shareholder, employee, the general public—must be achieved.

The problem then is not how to define this admittedly delicate balance in theory[59] but how to organize power and control within the corporation so as to serve these various, and often conflicting, interests most effectively. The most promising method to achieve this result is to entrust to a *trustee* the task of finding a fair balance between these conflicting interests. The sole prerequisite to such a system is that the trustee be personally disinterested. Here, it is true, one may meet with difficulties, for it is widely accepted that management largely identifies itself with certain enterprise interests such as economic growth, increasing power, and maximization of profits,[60] the very interests that will most often collide with the public interest.

In order to resolve this conflict of interest, therefore, some disinterested third party is needed to supervise management. This felt need is probably the motivation for the current American trend towards inclusion of public-interest directors on the board, or establishment of public-interest committees. In Germany, one may also occasionally find a personality from outside the business community, not directly affiliated with shareholder or other specific interests, sitting on the supervisory boards of corporations. Effective control of the conflict of interest problem, however, requires more that just some ornamental enrichment of the board; instead, a supervisory authority independent from, and superior to, management must be established. This supervisory system should, on the one hand, be organized on a supracorporate level so as to avoid the danger of succumbing to the "gravitational attraction of management"[61] and, on the other hand, be integrated into the power structure of the individual corporation in order to nurture that informal and close working relationship between management and supervision

58. ROTH, *supra* note 10, at 306-08.

59. See notes 7-33 & accompanying text *supra.*

60. J. GALBRAITH, THE NEW INDUSTRIAL STATE 173-78 (1969).

61. European experience amply demonstrates that any intra-corporate supervision may easily succumb to the dictates of management. Vagts, *supra* note 5, at 61.

that is necessary for an effective control not detrimental to effective management. What is needed, therefore, is a system of public control over private enterprise organized on a governmental basis and exercised by independent personalities assigned to the individual enterprise.[62] Even under such a system, however, the question remains unanswered as to what additional powers beyond the right to information and the corresponding privilege of consulting and arguing with management should be bestowed upon the supervisory body.

In a rudimentary form, a supervisory system similar to the one outlined above has been realized in the Dutch corporation law of 1971. Under Dutch law, the supervisory board is no longer elected by the shareholders but is granted the right of co-optation. In addition, a social-economic council—*Sociaal Economische Raad*—has been instituted on a quasi-governmental level which insures that membership on boards of the different corporations is properly balanced and that the board members are properly qualified. In the social-economic council itself the public, the employer, and the employee interests are equally represented.[63] The Dutch model has been incorporated into the EEC directive for the coordination of the European corporation laws[64] and may, therefore, have a great impact on the future development of European corporation law.[65]

V. Intracorporate Participation of the Social Factor

Employee Codetermination

In contrast to the disinterested, impartial trusteeship suggested above, the preferred method in Europe today for accommodating the various capital, employee, and public interests concerned with the administration of the corporate enterprise is the equal *participation* by all such interests in the corporate decision-making process. Under such a system, at least in theory, all the different interests, including the public

62. For a more detailed analysis of this proposed system, see ROTH, *supra* note 10, at 320-22.

63. WETBOCK VAN KOOPHANDEL Art. 52. *See* I. LILL, DAS NIEDERLANDISCHE GESETZ ÜBER DIE GESELLSCHAFT MIT BESCHRANKTER HAFTUNG UND ÜBER DIE STRUKTUR DER KAPITALGESELLSCHAFTEN RABELS Z 36 (1972) 161-79; Roth, *Das neue niederländische Aktienrecht: Absage an die "Unternehmensdemokratie"*, AWD BB 1974, 312-15; Sanders, *Reform des Gesellschaftsrechtes in den Niederlanden*, DIE AG 1971, 389-96.

64. 5th Coordination Directive of Oct. 9, 1972, Commission of the European Community, art. 4 III.

65. Niessen, *Zum Vorschlag einer "europäischen" Regelung zur Mitbestimmung für "nationale" Aktiengesellschaften*, ZGR 1973, 218-26 (text of the directive is at p. 226).

interest, are represented and integrated within the corporate power structure. Each is given a voice—and a vote—in corporate matters.

The most important development in this area has been the emergence of a system of employee codetermination. Although some argue that under a system of employee codetermination, the public interest is not represented in a comprehensive way, others maintain that employee codetermination takes care not only of specific employee interests but of the public welfare as well. The German statute governing the mining and steel industry, for example, indirectly holds the employee representatives responsible for the public welfare as well.[66] But, all commentators generally agree that consideration of public needs is at best simply a byproduct of the representatives' activities on behalf of employees and can be expected only when the public interest coincides with employee-trade union interests.[67] Such an identity of interests, however, never arises in several important situations such as when corporate proposals promise to increase the availability of employment while, at the same time, threaten to destroy the environment.[68] As yet, moreover, no European nation has established a system of corporate management wherein representatives of the public interest represent a "third power" on the board of the corporation, operating on an equal footing with representatives of the shareholders and employees. Suggestions to this effect, however, have been part of the legal and political discussion for decades.

A system of employee codetermination is most fully developed in Germany where employee representatives are given a position on the *Aufsichtsrat* (supervisory board). Since 1976[69] the German system has been all but equal with shareholders and employees electing 50% of the *Aufsichtsrat* members respectively. The chairman of the board, however, is generally a shareholder delegate to whom is given the decisive vote in case of a tied vote. In the German mining and steel industry total parity on the supervisory board had been granted by statute as early as 1951; in addition, one seat on the management board (*Vorstand*)[70] is reserved for an employee confidant, the so-called direc-

66. MONTAN-MITBESTG § 6(2).

67. STUDIENKOMMISSION DES DEUTSCHEN JURISTENTAGS, UNTERSUCHUNGEN ZUR REFORM DES UNTERNEHMENSRECHTS I, at 42 (1955); *Mitbestimmung im Unternehmen* (Biedenkopf-report), in VI/334 BT-DRUCKSACHE 55, 89 (1970).

68. To the conflict-of-interest problems of the Arbeitsdirektor, see S. VIESEL, DER ARBEITSDIREKTOR 21-28 (1973).

69. MitbestimmungsG of May 4, 1976, BGB1. Part I, at 1153 (in force since July 1, 1976).

70. See note 7 *supra*.

tor of labor.[71]

Examining the German system of employee codetermination more closely, however, one might question the extent to which genuine employee interests are in fact represented on the supervisory board. The law requires that a certain number of the employee representatives be trade union representatives. Experience has shown, moreover, that the election of the remaining representatives is generally dominated by the trade unions as well.[72] Under such a system, therefore, "employee democracy" may not fare much better than "shareholder democracy." This conclusion is further substantiated by the fact that trade union membership in many professions is less than fifty percent of the work force. It cannot be taken for granted that this form of codetermination, therefore, will effectively represent the interests of all the employees of the enterprise in question or of the work force in general. Indeed, it is doubtful that this product "made in Germany" is suitable for export.

A system of employee codetermination is found in a somewhat more diminished form in other European countries as well. In Austria, for example, one third of the seats on the supervisory board is reserved for employee representatives;[73] the same figure is found in the EEC coordination directive.[74] The project of a *societas europea*, while advocating full parity of shareholder and employee representatives, nevertheless adds a "third force" to the supervisory board which is more directly affiliated with the public interest.[75] In England and other nations, similar reforms are being discussed.[76]

A *second kind of employee codetermination* requires some attention at this point. The laws in several European nations require that important corporate decisions having a particularly strong impact upon employee interests—such as plant closings or large scale cutbacks—be subject to a veto by the workers' council representing the employees within the factory. In Germany, moreover, the statute in effect from

71. Montan-MitbestimmungsG of May 21, 1951, BGBl. part I, at 347; Mitbestimmungs-ErgänzungsG of Aug. 7, 1956, BGBl. Part I, at 707 (the two laws on codetermination in the mining and steel industry).

72. For details, see G. H. ROTH, M. LORBACHER & W. MERKEL, DIE MITBESTIMMUNG DES ARBEITNEHMERS IN DER PRAXIS—ERGEBNISSE EINER EMPIRISCHEN UNTERSUCHUNG, ZGR 1974, 317-42.

73. Labor Law-ArbeitsverfassungsG-of Dec. 14, 1973, BGBl. 1974/22, § 110.

74. 5th Coordination Directive of Oct. 9, 1972, Commission of European Community, art. 4 II.

75. See note 15 *supra*; Statut art. 74a, 75a, b.

76. For a survey see K.O. HONDRICH, MITBESTIMMUNG IN EUROPA (1970); F. GAMILLSCHEG, MITBESTIMMUNG DER ARBEITNEHMER, ARBEITEN ZUR RECHTSVERGLEICHUNG NR. 92 (1978).

1952 to 1972 expressly required these factory councils to consider the public interest as well.[77] This latter obligation, however, proved to be nothing but a rule without sanctions. Consequently, the new statute of 1972 dispensed with this obligation altogether. In Austria, however, a veto by the workers' councils in matters of this kind has the effect of bringing the matter before a governmental commission where the public interest is also represented.[78]

Financial Participation

Quite a different method of guaranteeing employee participation in the management of the corporate enterprise is being instituted on a voluntary basis in a number of German companies:[79] capital participation by the workers in the enterprise itself. This method, it is true, is aimed primarily at goals other than employee participation in control, viz. social reform and distribution of property. Nevertheless, it also confers on the participating employee the normal shareholder voting rights when the participation takes the form of stockholdings. Experience indicates, however, that employee shareholders, like small shareholders in general, fail to exercise active control in the management of public corporations[80] and abandon their share of the power to management or, possibly, the trade unions.[81] Workers' financial participation in the enterprise, therefore, although a very important expression of corporate social responsibility, fails to be a functional means for making corporate social responsibility truly effective.

Direct Public Interest Representation

Independent representation of the public interest in the management of large corporations has until now been confined to academic discussions only. Virtually all suggestions in this area amount to proposals for the participation by public interest representatives as a "third force" on the supervisory board or on some similar body. Such a third force would serve not only to mediate between conflicting employer and employee interests but also to insure that the public interest is fully considered in all corporate decisions. Parity of all three

77. BETRIEBSVERFASSUNGSG (Factory Law) of 1952, § 49(1).

78. ARBEITSVERFASSUNGSG. § 112.

79. Proposals to make this method binding on all enterprises by law are presently under consideration in Germany and France.

80. *See* G. ROTH, VERMÖGENSBETEILIGUNG UND MITBESTIMMUNG, BB 1977, 799.

81. Some authors and employer organizations expressed apprehension with regard to the project of making capital participation mandatory. This project of 1974 originally favored by the German government has since disappeared from the legislative discussion.

groups—shareholder, employee, public interest—is suggested most often, but more complicated number games may also be found. Several different modes of nomination are suggested. The most political one provides for an election of the public interest representatives by parliament.[82] Other alternative modes include nomination by the government[83] or by a governmental or quasi-governmental agency created expressly for this purpose.[84]

A nongovernmental method for selecting the board members of the "third force" is to leave the decision to the shareholder and employee factions.[85] Under such a system, a supervisory governmental agency would be called on to select the members only in cases where the two factions cannot agree. This system is adopted by the draft statute of a *societas europea*[86] which requires, in addition, that all members of this third group be both dedicated to the public interest and independent of either the shareholder or employee factions.[87]

A balanced representation of the conflicting interests within the corporate structure, however, does not necessarily guarantee a balanced decision-making process nor an efficient and competent leadership. Indeed, an intricate internal decision-making process that permits

82. C. OTT, RECHT UND REALITAT DER UNTERNEHMENSKORPORATION (1977).

83. *Studienkommission des Deutschen Juristentags, Untersuchungen zur Reform des Unternehmensrechts* I 44 (1955); *see* BLOCH-LAINÉ, POUR UNE RÉFORME DE L'ENTERPRISE (1963); H. STEINMANN, DAS GROßUNTERNEHMEN IM INTERESSENKONFLIKT (1969).

84. H. PLANITZ, DIE STIMMRECHTSAKTIE (1922). *See also* ROTH, *supra* note 10, § 44. All these various alternatives, however, are very similar to the old commissioner of corporations nortorious since the early times of European corporation law. The institution of the state commissioner—a governmental supervisory officer assigned to a particular company—has been recently revived in Austria in the field of investment companies. See Investment Company Law (InvestmentfondsG) of July 10, 1963, BGBl. 1963 No. 192, p. 1817, art. 2 (10).

85. Another less promising approach can be found in the German environmental law which requires every enterprise to select one employee from its ranks to serve as an "environmental deputy." The environmental deputy's duties are twofold: first, to insure that environmental regulations are observed and, second, to encourage the enterprise, as a matter of general policy, to adopt measures protective of the environment. German Clean Air Law (BundesimmissionsschutzG) of March 15, 1974, § 53. One obvious drawback of this system, however, is that the environmental deputy lacks personal independence and any power of his own. At least one means of achieving greater independence would be to make the recall and dismissal of these deputies subject to special safeguards.

86. See note 13 *supra*, art. 74a, 75a, b.

87. It seems obvious, however, that the primary purpose of this independent third group is to mediate between shareholder and employee interests rather than to safeguard the public interest. The model statute, therefore, belongs more appropriately to the more limited subject of employee codetermination rather than to the larger considerations of corporate social responsibility. Nonetheless, the model represents an important first step towards the participation of the social factor in corporate management.

the participation of conflicting interests may, at times, even obstruct the successful management of the enterprise.

VI. State Regulatory Powers as a Means of Implementing Corporate Social Responsibility

If one is unwilling to entrust the enforcement of corporate social responsibility to forces wholly within the corporation, what remains is direct governmental intervention. Such intervention, however, would not be limited to the enforcement of specific regulatory laws such as those intended to protect the environment or health[88] but rather would entail a much more profound encroachment upon management's freedom of decision in administering the enterprise. Presently in Europe, state regulatory powers of this nature are limited to certain specific "sensitive areas" such as banking, public utilities, and insurance. Most often specific governmental supervisory agencies have been established to regulate in these areas. The question becomes, therefore, whether this kind of pervasive state regulation is a suitable means for implementing corporate social responsibility in general.

Antitrust Law and Price Regulation

Sometimes the antitrust laws offer governments some authority to intervene to various degrees in the decision-making process of any corporation in order to compel that corporation to be responsive to the public welfare. The criterion that triggers this authority is the domination of the market by an enterprise.[89] Under German antitrust law, for example, the antitrust office, a federal administrative agency, may prohibit enterprises dominating the market from "abusing" their position.[90] Acting on this authority, the antitrust office in 1977 succeeded in persuading the Volkswagen Company to reduce a planned price increase.[91] In the European Community law, Article 86 of the EEC-treaty[92] details the cases of "abuse" and in particular prohibits the extortion of excessive prices or improper contractual conditions and the imposition of any restriction on production, sales, or research that operates to the detriment of the consumer. In Austria, cases of abuse come under the jurisdiction of the antitrust court while the right of ac-

88. See note 2 *supra*.
89. KARTELLG (German Antitrust Law) § 22; AUSTRIAN KARTELLG § 40.
90. KARTELLG § 22(4)(5).
91. H.J. MERTENS, C. KIRCHNER & E. SCHANZE, WIRTSCHAFTSRECHT 120 (1978).
92. Of the same tenor, AUSTRIAN KARTELLG § 46.

tion is reserved to certain governmental agencies and employer and employee organizations.[93]

By use of the various antitrust laws, therefore, some important violations of the public interest, and in particular of consumer interests, have been subjected to state intervention. These mechanisms of the antitrust laws, however, cannot be applied against every enterprise, or even against every large enterprise, but only against those companies dominating the market. Nevertheless, such companies are most prone to an abuse of the public welfare and free market competition often proves to be a sufficient regulator of those enterprises that do not dominate the market.

Some Western European nations such as Austria[94] and France also bestow a far-reaching authority of price regulation in private commerce upon their governments. In Austria, for example, the secretary of state, under certain conditions, may fix a particular price as "economically legitimate" when an enterprise dominating the market raises its prices excessively.[95]

The Limited Value of State Regulation

The antitrust laws described above amply demonstrate that, at least in principle, state regulatory powers can be useful for implementing corporate social responsibility. Such direct regulation by the state, however, is not universally applicable. First, because of the principles of the constitutional state, any kind of state intervention must be limited to clearly defined cases. Thus, a general provision empowering a governmental agency to interdict wholly at its own discretion any entrepreneurial action that it perceives to be detrimental to the public interest, or, for that matter, to command such actions on behalf on the public interest, is unacceptable. Second, such a policy would presage the end of free and private enterprise, at least on the level of the large enterprise. It is, therefore, for good reason that the antitrust laws permit state intervention only when the very mechanisms of private and autonomous bargaining have been repudiated. Third, it is hard to imagine that a comprehensive state regulation of all economic activities potentially relevant to the public welfare would operate effectively. Experiences with price control indicate the difficulties inherent in any system or pervasive state regulation, and price control is a trifle compared

93. AUSTRIAN KARTELLG §§ 46, 94.

94. PREISGESETZ (Pricing Law) of May 19, 1976, BGBl. 1976/260.

95. PREISG § 3(1). In addition, German and Austrian antitrust law gives some protection to small firms dependent on the dominating firms. *See, e.g., id.*

to a task of such Orwellian dimensions.[96]

VI. Indirect Regulation as a Means of Implementing Corporate Social Responsibility

Jawboning and Other Governmental Activities

The practice commonly called "jawboning" in the United States whereby the government persuades corporations by indirect and extra-legal means to behave in a particular fashion is also well known in Europe. Under such a practice, when corporate managements fails to be impressed with the government's arguments, stronger medicine is at hand: the government may go public and publicize the corporation's inauspicious actions or it may threaten to withhold certain benefits such as government contracts from the intransigent enterprise.[97] Jawboning is often used to prevent price increases or to regulate affairs relevant to foreign politics or matters of general national concern. The record of jawboning is mixed and the practice is appropriately limited to particularly important cases only. One important example of this kind of institutionalized moral persuasion is the "concerted action" (*Konzertierte Aktion*) established by German law in 1968. It is a round table meeting of government representatives, the federal bank, academic consultants, and employer and employee organizations which, by means of appeal and persuasion only, attempts to keep the industry as well as other economic groups in line with the economic policies of the government.

Industrial Self-Policing

In certain areas industrial self-policing operates even more informally than the "concerted action" method mentioned above. This more informal method is sometimes favored by administrative agencies, the government and other political forces, and its very purpose most often is to prevent a legislative or administrative intervention. In 1971, for example, German tobacco manufacturers agreed among themselves to restrict their advertising of cigarettes for the protection of the public health in general and of youth in particular.[98] Another example of this more informal method is the employer organizations that,

96. One further consideration in this area is the special problem posed by multinational corporations whose decisions and actions are not localized in any one nation.

97. H.J. MERTENS, C. KIRCHNER & E. SCHANZE, WIRTSCHAFTSRECHT 145 (1978). For the practice of the Belgian banking commission, see DABIN, LE CONTRÔLE DES HOLDINGS EN DROIT BELGE 270 (1977).

98. See D. BAAS, *supra* note 11, at 191 & *passim*.

in order to fight juvenile unemployment, promise to create a certain number of new training jobs. Another example from German industry is the guidelines against insider trading promulgated as a code of conduct for companies and their managers in order to prevent the abuses of insider trading.[99]

Industrial self-policing is potentially an effective means for implementing corporate social responsibility. Peer pressure by those enterprises favoring greater corporate social responsibility can achieve more effective results than governmental influence. Having convinced their competitors of the need for more social responsibility, these peers are free to realize their good intentions without apprehending competitive disadvantages. Experience indicates, however, that in practice self-policing suffers from half-heartedness in substance and tends rather to serve as a "moral fig-leaf" than to solve the real problems.

VIII. State Capitalism

State Ownership in Private Companies

The least complicated way for the state to influence the corporation is to acquire meaningful stockholdings in the corporation. The state may then completely control the enterprise by means of corporation law. This approach might result in the optimal implementation of corporate social responsibility if three conditions are met. First, the government agent responsible for administering the government's stockholdings must be optimally qualified to safeguard the public interest. Second, the law itself must permit a shareholder to demand that management pursue a course of action most beneficial to the public welfare even when such action may prove detrimental to the best interests of other private shareholders and competitors. Third, the state, when acting as a shareholder, must in fact give priority to these interests. As European experience amply demonstrates, however, all three conditions are not easily satisfied.

State capital holdings in private companies are of great importance in nearly all European countries. Many private corporations are entirely or partly owned by the state.[100] The state owns, for example,

99. Empfehlungen der Börsensachverständigenkommission beim Bundes- wirtschaftsministerium of Nov. 13, 1970.

100. In addition to its holdings in private corporations, the state also owns enterprises for the purpose of administering certain public services such as the postal service, telephone and telegraph, and public transport (including the national railway systems). In such enterprises, however, the public interest prevails from the beginning, even if aspects of profitability cannot entirely be neglected for fiscal reasons.

100% of the stock in the Italian Alfa Romeo company and the French Renault company; in the German Volkswagenwerk corporation, the state is a co-owner of 40%. In total, the share of the state's holdings in private enterprise is estimated at more than one third in Italy[101] and France. More exact statistics are available for Austria. As a consequence of the nationalization of the basic industries and the banking business after World War II,[102] the Austrian state participates to the extent of more than one quarter in the industrial net production.[103] The share of state-owned companies in the nominal gross national product amounts to nineteen percent. The figures are exceptionally high in the fields of public utilities (78.5%) and banking and insurance (70.8%). A similar picture emerges from the employment figures: state-controlled business and industry excluding employees in the public sector account for 400,000 employees, equivalent to eighteen percent of the entire working force.

The State-owned Company

By owning 100% of an enterprise, the state, in administering the corporation, is free to pursue the public interest at the expense of profit maximization. It is difficult to judge, however, to what extent the state does sacrifice profits for the public welfare. Most cases to come to light in this area involved the situations where state enterprises refuse to enforce needed cutbacks or restrictions on production in order to preserve jobs. In Germany, for example, a state-owned steel plant did not take part in a general price increase put into effect by other enterprises. Italian state-owned enterprises in particular are known for investing in underdeveloped regions for social and political reasons. Economic losses resulting from such decisions are deliberately taken into the bargain. On the other hand, state-owned enterprises have also incurred considerable losses without any obvious compensation in benefits to the public.

In fields other than those already mentioned, state-owned enterprises are not particularly known for a marked sense of social responsi-

101. *See* DIE ZEIT, June 30, 1978, at 19.

102. Subject to nationalization were, among others, 100% of the iron ore industry, 100% of the pig-iron industry, 95% of the crude-steel industry, 91% of brown coal mining, 70% of the aliminum production, 85% of the energy sector and the three largest banks. *But see* Nemschak, in GEMEINWIRTSCHAFT IN ÖSTERREICH 24 (Arbeitsgemeinschaft der österreichischen Gemeinwirtschaft, ed. 1972).

103. 26.3%. Statistics taken from R. Grünwald, *Die verstaatlichte Industrie Österreichs*, in DIE GEMEINWIRTSCHAFT IN ÖSTERREICH 190-225; STATISTISCHES HANDBUCH DER REPUBLIK ÖSTERREICH 1975.

bility. Cars from state-owned factories, for example, are not any safer than those produced by privately owned factories. State-owned factories contribute their share to polluting the environment.

Other motives for state acquisition of private enterprise exist. The most frequent reason, at least in recent times, for state acquisition of private enterprise is job preservation: the enterprise is close to bankruptcy and the state intervenes in order to preserve jobs. Thus, once again the goal of securing employment prevails. Some other less common reasons may be found as well: the original owner may have been dispossessed for political reasons; an enterprise may be taken over for its military potential or to prevent foreign control. At any rate, no signs of a single-minded governmental investment policy for the purpose of serving the public interest can be found. The preeminence of the public interest, it is true, was often used as an argument when the nationalization of certain enterprises was effectuated. The realities of nationalization, however, more often give the impression that the underlying reason for such action was not so much social responsibility but rather the acquisition of key positions of economic power such as commercial banks, and the steel industry. Finally, some legal as well as economic *reservations* to the state-owned company's policy of subjecting profitability to other goals have to be noted. If, for example, the steel industry needs price increases for valid economic reasons, and if the state-owned plant, being in a position to bear the resulting losses more easily, does not join in the rise, the private competitors are damaged—with the anti-trust law consequences already looming—and the steering mechanisms of the national economy jeopardized.

State vs. Private Shareholders

When the state is *not the sole stockholder* of the corporation, it becomes less clear whether the state is free to neglect the profit interests of its private co-shareholders[104] in order to pursue some public interest. The manner in which the German secretary of economics handled the 1962 Volkswagenwerk incident may shed some light in this area. The Volkswagenwerk corporation planned a price increase which was contrary to government economic policy. The secretary, however, neither made use of the large state stockholdings in the corporation, nor intervened in the decision-making process through the state representatives on the board, but rather resorted to jawboning.[105] One might even sub-

104. *But see* M. LUTTER, ZUR TREUEPFLICHT DES GROβAKTIONARS, JZ 1976, 226.

105. The Secretary, however, failed to convince the Volkswagenwerk Corporation to refrain from raising their prices.

ject jawboning to restrictions when the state has holdings in the enterprise. Otherwise, the management of the company may feel obliged to comply despite strong reasons to the contrary.

VIII. Conclusions

The foregoing analysis of various European models in the field of corporate social responsiblity supports the following conclusions:

(1) As a general principle, corporate social responsibility ought to be recognized in most European countries although not always expressly adopted in the codes. The problem faced in most European countries is how to make this general principle effective in any particular case.

(2) To the extent that corporate social responsibility lends itself to particularization in specific legal provisions such as environmental law, worker protection laws, or products liability statutes, the various European models indicate that the legislature should remain active. The implementation of such specific provisions will then be mainly the task of administrative agencies.

(3) On the other hand, state regulatory powers, or even state capitalism, are not the panacea to all problems in the area of corporate social responsiblity. Only in particularly sensitive areas may the advantages of such massive governmental interference potentially outweigh the inherent menace to our economic system posed by such governmental action.

(4) The foregoing analysis indicates that the most promising method of making corporate social responsibility effective is by means of an elaborate combination of internal corporate mechanisms with external mechanisms more subtle than state interference. Internally, the corporation's managing body must be constituted so as to insure a balanced evaluation of the conflicting interests of the shareholders, employees, and the general public. External stimuli may prove to motivate the decisionmakers accordingly.

(5) The internal approach pursued in some European countries is aimed at the direct representation of all interests—shareholders, employees, and the general public—within the corporate power structure (the "pluralistic principle"). It is submitted, however, that a much better approach would be to make management the trustee of all interests involved. Such a system would entail a conflict-of-interest-free supervisory body established on a supra-management level (the "principle of

responsibility and control").

(6) As for the external stimuli, corporate social responsibility may be most effectively realized through the pressure exerted by public opinion. In order to achieve this, increased disclosures of corporate actions and increased attention by the mass media and the public at large to the actions of corporations are needed. A system of social accounting seems to be the most promising instrument by which to realize these goals.

Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court

By John G. Fleming

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